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ALEXANDER L. STEVAS,
CLERK

No. 83-1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

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THEODORE KOEHLER, Warden,

Petitioner,

-vs-

TILDEN N. ENGLE,

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS CONCLUSION CONSISTENT WITH SANDSTROM v MONTANA, 442 US 510 (1979), THAT THE TRIAL COURT'S INSTRUCTIONS ON REASONABLE DOUBT WERE NOT RHETORICALLY INCONSISTENT WITH BURDEN SHIFTING INSTRUCTIONS ON PRESUMED INTENT AND FINDING WHEN READ AS A WHOLE AS REQUIRED BY CUPP v NAUGHTEN, 414 US 141 (1973), THAT THE REMAINDER OF THE INSTRUCTIONS EXACERBATED THE BURDEN SHIFTING EFFECT PRESENTS ANY IMPORTANT FEDERAL QUESTION?

II. WHETHER THE COURT OF APPEALS COMPREHENSIVE REVIEW OF THE EVIDENCE PRESENTED, APPLICATION OF THE TRADITIONAL CHAPMAN v CALIFORNIA, 386 US 18 (1967), HARMLESS ERROR TEST AND CONCLUSION THAT THE BURDEN SHIFTING INSTRUCIONS ON PRESUMED INTENT WERE NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE CONFLICTING EVIDENCE OF INTENT WAS PRESENTED RAISING A QUESTION OF FACT FOR THE JURY PRESENTS ANY SIGNIFICANT FEDERAL QUESTION?

III. WHETHER THE COURT OF APPEALS CONCLUSION THAT THE CAUSE AND PREJUDICE REQUIREMENTS OF WAINWRIGHT v SYKES, 433 US 72 (1977), DO NOT APPLY WHERE THE HIGHEST COURT OF THE STATE WHOSE JUDGMENT IS UNDER REVIEW HAS SPECIFICALLY HELD AS A MATTER OF STATE PROCEDURAL LAW THAT NO CONTEMPORANEOUS OBJECTION IS REQUIRED AT TRIAL TO PRESERVE PRESUMED INTENT INSTRUCTIONAL ERRORS PRESENTS ANY IMPORTANT FEDERAL QUESTION?

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IV. WHETHER PETITIONER'S ABANDONMENT IN FEDERAL COURT OF ITS SEPARATE PROCEDURAL DEFAULT CLAIM BASED ON RESPONDENT'S FAILURE TO RAISE THE PRESUMED INTENT INSTRUCTIONAL ERROR IN HIS INITIAL APPEAL TO MICHIGAN'S INTERMEDIATE APPELLATE COURT PRECLUDES RESURRECTION OF THAT CLAIM IN THIS COURT?

V. WHETHER MICHIGAN HAS ANY PROCEDURAL DEFAULT RULE BARRING APPELLATE REVIEW OF ISSUES NOT RAISED IN THE INITIAL APPEAL TO THE STATE'S INTERMEDIATE APPELLATE COURT?

VI. WHETHER THE STATE COURTS' FAILURE TO RELY ON ANY PROCEDURAL DEFAULT AND REJECTION OF RESPONDENT'S CONSTITUTIONAL CHALLENGE FOR LACK OF MERIT IN THE GROUNDS PRESENTED RENDERS THE CAUSE AND PREJUDICE REQUIREMENTS OF WAINWRIGHT v SYKES, 433 US 72 (1977), INAPPLICABLE?

VII. WHETHER PETITIONER'S FAILURE BELOW TO RAISE ANY CLAIM DISPUTING THE RETROACTIVE APPLICATION OF SANDSTROM v MONTANTA, 442 US 510 (1979), PRECLUDES CONSIDERATION OF THAT CLAIM IN THIS COURT?

VIII. WHETHER THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR DECIDING THE EXTENT TO WHICH SANDSTROM v MONTANA, 442 US 510 (1979), SHOULD BE RETROACTIVELY APPLIED GIVEN THAT RESPONDENT RAISED HIS CONSTITUTIONAL CHALLENGE TO THE PRESUMED INTENT INSTRUCTIONS IN HIS INITIAL APPEAL TO THE MICHIGAN SUPREME COURT IN 1977 TWO YEARS BEFORE SANDSTROM WAS DECIDED?

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## COUNTERSTATEMENT OF THE CASE

The sole question facing Respondent's jury was whether the prosecution had proven beyond a reasonable doubt that he possesed the requisite mens rea when he shot the Deceased to be found guilty of willful, deliberate and premeditated first degree murder.

Respondent testified he drank heavily for the three days preceeding the shooting ano also ingested four librium pills the last day (250-257). The next thing he fully recalled was waking up in jail (258). Of the interim he only recalled "the fact that fur was flying in my face and I saw Lantz [the Deceased] as if in a nightmare on the floor with blood gushing from his mouth" (258). He testified that while he recalled talking to one Detroit police officer after he turned himself in, he did not recall saying many of the things the police claimed he said (261, 308-309).

Dr. Mary Ansley testified for the defense that as a result of mounting stress caused by five recent deaths in Respondent's family, a suicide attempt by his wife and the loss of his job, he suffered a sudden, dissociative reaction mental breakdown at the time of the shooting characterized by impaired perception, judgment and consciousness (353-359). Dr. Ervin Edgar, called by the prosecution on rebuttal, conceded that Respondent suffered from chronic alcoholism and that at the time of the shooting his

heavy drinking might have anaesthetized him to the point that he could not control himself (434-435).

Officer Richard Ren, who spoke to Respondent at the plant shortly after the shooting, testified that Respondent said he came to the plant to talk to the Deceased about getting his job back, had not planned or intended to shoot the Deceased and that while they talked he just pulled out his gun and started firing - - "I don't know . . . I guess I just didn't think" (107, 118-119). Ren testified that during their discussion Respondent at times appeared too calm and emotionless for what had happened and at other times was in tears (94-95, 107).

Renus Engle, Respondent's nephew, testified that when he saw Respondent approximately 30 minutes before the shooting, Respondent "didn't act like his normal self, he had tears running out of his eyes . . . [and] he had a nervous pitch to his voice" (I, 12, 20-22). Never before had Renus seen Respondent acting this way (I, 21-22).

Plant worker Donald Ambrose, who saw Respondent approximately 15 minutes before the shooting, testified that Respondent "didn't look quite right . . . he looked so strange" (38-39, 47).

Plant worker William Richardson, who witnessed the shooting and the events immediately preceeding it, testified that Repondent and the Deceased talked together for five minutes before Respondent pulled out a gun and started firing (21). Richardson testified that his attention was drawn to Respondent

just before the first shots were fired by the "strange" look in Respondent's eyes, a look which he testified he had never seen before during the four years he had worked with Respondent (24-26).

Regarding the question of intent, the trial judge instructed the jury that

> "malice is implied from any deliberate and cruel act against another person, however sudden" (670)

and that

> "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" (670-671).

Regarding the defense of insanity, the judge instructed the jury that

> "[t]he prosecution starts out with a presumption that every man is presumed to be sane and responsible for his acts" (678)

and that

> "[w]hen evidence . . . is introduced creating a reasonable doubt of insanity, the State has the burden of proving sanity beyond a reasonable doubt" (678-679).

Regarding the defense of intoxication, the judge instructed the jury that

> "the law presumes the Defendant to have intended the disturbance or obscuration of his faculties which followed his voluntary intoxication . . . and he should, therefore, be held responsible, as well, for the vicious

excesses of the will thus set free" (673-674).

Finally, with regard to Respondent's particular defense of dissociative reaction, the judge instructed the jury that

> "[w]here this [condition] can be proved, it would constitute a defense" (679).

## REASONS FOR DENYING THE WRIT

**I. THE COURT OF APPEALS CONCLUSION CONSISTENT WITH SANDSTROM v MONTANA, 442 US 510 (1979), THAT THE TRIAL COURT'S INSTRUCTIONS ON REASONABLE DOUBT WERE NOT RHETORICALLY INCONSISTENT WITH BURDEN SHIFTING INSTRUCTIONS ON PRESUMED INTENT AND FINDING WHEN READ AS A WHOLE AS REQUIRED BY CUPP v NAUGHTEN, 414 US 141 (1973), THAT THE REMAINDER OF THE INSTRUCTIONS EXACERBATED THE BURDEN SHIFTING EFFECT PRESENTS NO IMPORTANT FEDERAL QUESTION.**

The trial court's instruction that "the law gives us a rule of thumb that a person is presumed to intend the natural consequences of his acts" is not meaningfully distinguishable from the unconstitutional burden shifting instruction condemned in Sandstrom v Montana, 442 US 510 (1979). As explained by Judge Contie for the unanimous panel in this case, a "rule of thumb" in common parlance is a directive that is

generally to be followed unless grounds for departing from the rule are shown. Engle v Koehler, 707 F2d 241, 245 (CA 6, 1983). A reasonable juror hearing this instruction, together with the companion instruction not present in Sandstrom that "malice is implied from any deliberate and cruel act against another person, however sudden", easily could have concluded that the essential element of intent was to be presumed from Respondent's admitted act of shooting the Deceased unless Respondent proved otherwise. The combined effect of these two instructions resulted in a more egregious constitutional violation than that in Sandstrom.

The Court of Appeals correctly concluded that the trial court's instructions on reasonable doubt were not rhetorically inconsistent with and did not cure the burden shifting effect of these two instructions. Engle v Koehler, supra at 245. The reasonable doubt instructions told the jurors they could consider the fact that a deadly weapon was used and the number and location of the Deceased's wounds in determning whether the requisite mens rea had been proven. Given that Respondent admitted repeatedly shooting the Deceased, an act the natural consequences of which is death, the jurors easily could have concluded that the use of a deadly weapon and the nature of the wounds gave rise to a presumption of intent satisfying the prosecution's burden on this element unless Respondent proved otherwise. Compare Sandstrom, supra at 524.

The Court of Appeals also correctly found that when read as a whole as required by Cupp v Naughten, 414 US 141 (1973), the remainder of the instructions given in this case exacerbated the burden shifting effect of the presumed intent instructions. Engle v Koehler, supra at 245. With regard to Respondent's defenses, the judge told the jury that the prosecution was entitled to "a presumption" that he was sane, that "the law presumes" he intended the acts resulting from his intoxication and that if his claim of dissociative reaction "can be proved" it would constitute a defense. A reasonable juror hearing all of these instructions almost certainly would have entered the jury room believing that unless Respondent proved otherwise, the requisite mens rea was to be presumed from his acts.

None of the cases from other circuits cited by Petitoner involved the same combination of instructions found here and are for that reason factually distinguishable.

The Court of Appeals conclusions and findings based on the facts of this particular case present no important federal question.

**II. THE COURT OF APPEALS COMPREHENSIVE REVIEW OF THE EVIDENCE PRESENTED, APPLICATION OF THE TRADITIONAL CHAPMAN v CALIFORNIA, 386 US 18 (1967), HARMLESS ERROR TEST AND CONCLUSION THAT THE BURDEN SHIFTING INSTRUCITONS ON PRESUMED INTENT WERE NOT HARMLESS BEYOND A REASONABLE DOUBT BECAUSE CONFLICTING EVIDENCE OF INTENT WAS PRESENTED RAISING A QUESTION OF FACT FOR THE JURY PRESENTS NO SIGNIFICANT FEDERAL QUESTION.**

The Court of Appeals did not, as Petitioner represents, limit its harmless error analysis to whether Respondent had challenged the existence of the requisite mens rea at trial. The Court carefully surveyed the evidence presented by both the prosecution and defense, applied the traditional harmless error test established in Chapman v California, 386 US 18 (1967), and concluded that the unconstitutional presumed intent instructions could not be held harmless beyond a reasonable doubt given the conflicting evidence presented on intent. Engle v Koehler, supra at 242-244, 246.

This careful, case by case approach would pass muster even under the more conservative harmless error analysis advocated by the dissenting plurality opinion in Connecticut v Johnson, ___ US ___; 103 S Ct 969; 74 LEd 2d 823 (1983), and presents no significant federal question.

**III. THE COURT OF APPEALS CONCLUSION THAT THE CAUSE AND PREJUDICE REQUIREMENTS OF WAINWRIGHT v SYKES, 433 US 72 (1977), DO NOT APPLY WHERE THE HIGHEST COURT OF THE STATE WHOSE JUDGMENT IS UNDER REVIEW HAS SPECIFICALLY HELD AS A MATTER OF STATE PROCEDURAL LAW THAT NO CONTEMPORANEOUS OBJECTION IS REQUIRED AT TRIAL TO PRESERVE PRESUMED INTENT INSTRUCTIONAL ERRORS PRESENTS NO IMPORTANT FEDERAL QUESTION.**

The Michigan Supreme Court has specifically held as a matter of state procedural law that no contemporaneous objection need be made at trial to preserve Sandstrom type presumed intent instructional errors for appellate review. People v Wright, 408 Mich 1, 30, fn 13 (1980). This holding was applied as recently as April 26, 1983, when the Supreme Court summarily reversed by order because of a presumed intent instructional error despite the absence of an objection at trial. People v Hawley, 112 Mich App 784 (1982), reversed 417 Mich 975 (1983). The Court of Appeals conclusion that the cause and prejudice requirements of Wainwright v Sykes, 433 US 72 (1977), do not apply under such circumstances presents no important federal question.

## IV. PETITIONER'S ABANDONMENT IN FEDERAL COURT OF ITS SEPARATE PROCEDURAL DEFAULT CLAIM BASED ON RESPONDENT'S FAILURE TO RAISE THE PRESUMED INTENT INSTRUCTIONAL ERROR IN HIS INITIAL APPEAL TO MICHIGAN'S INTERMEDIATE APPELLATE COURT PRECLUDES RESURRECTION OF THAT CLAIM IN THIS COURT.

While Petitoner argued in the state courts that Respondent's failure to raise the presumed intent instructional error in his initial appeal to Michgan's intermediate appellate court constituted a separate procedural default barring review, that claim was abandoned in federal court. The only procedural default raised by Petitioner in either the District Court or the Court of Appeals was that Respondent had failed to lodge a contemporaneous objection to the instructions at trial. Petitioner even argued in the District Court as part of its argument there that Respondent had failed to exhaust his state remedies that Respondent could still raise the issue in the state courts by way of a delayed application for leave to appeal.1/

Having deliberately chosen not to present this distinct procedural default claim to either the District Court or the Court of Appeals, Petitoner

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1/ Brief of the Attorney General in Support of Motion to Dismiss, p 7. In Anderson v Harless, ___ US ___; 103 S Ct 276; 74 LEd 2d 3 (1982), this Court accepted a similar argument by the Michigan Attorney General.

should be precluded from resurrecting it in this Court. See Stegald v United States, 451 US 204, 208-211 (1981).

## V. MICHIGAN HAS NO PROCEDURAL DEFAULT RULE BARRING APPELLATE REVIEW OF ISSUES NOT RAISED IN THE INITIAL APPEAL TO THE STATE'S INTERMEDIATE APPELLATE COURT.

No Michigan decision has ever adopted a procedural default rule barring all subsequent review of any issue not raised in the initial appeal to the state's intermediate appellate court.

In People v Tubbs, 64 Mich App 341 (1975), the lead case cited by Petitioner in support of this proposition, a single judge suggested such a rule in a concurring opinion. Peitioner fails to point out, however, that the majority in that case specifically refused to adopt such a rule, noting that the Michigan Suprme Court had specifically rejected it. Id., 343.

In People v Bergin, 63 Mich App 526 (1975), the second case cited by Petitioner, the Court only held that an issue that had been raised in the initial appeal could not be relitigated in any subsequent appeal Id., 529-530.

In People v Woods, 416 Mich 581 (1982), the last case cited by Petitioner, the Court held that Sandstrom v Montana, 442 US 510 (1979), should be retroactively applied to all cases raising the issue and pending on direct appeal when Sandstrom was

decided. Woods, supra at 621-622. The Court neither discussed nor adopted any initial appeal procedural default rule.

The Michigan Supreme Court's decisions in fact make clear that it will address presumed intent instructional issues on the merits even though not raised in the initial appeal to the state's intermediate appellate court. In People v Gibson, 417 Mich 909 (1983), the Court by order remanded the case to the intermediate appellate court for consideration of such an issue even though it had not been raised in the initial appeal. On remand the Michigan Court of Appeals reversed despite the failure to initially raise the issue.2/

The Michigan Supreme Court's past decisions in other areas confirm that a failure to raise an issue on the initial appeal to the state's intermediate appellate court will not bar review. E.g., People v Hurst, 396 Mich 1, 11 (1976).

Petitioner's factual assertion that Respondent did not raise his presumed intent instructional issue until his second appeal in the Michigan Court of Appeals in 1978 is also incorrect. Respondent first raised the issue in his initial appeal to the Michigan Supreme Court in 1977.3/

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2/ People v Gibson, unpublished opinion No. 70122, released July 29, 1983, request for publication pending. See Appendix pp 1a-2a.

3/ See Michigan Supreme Court case number 57655, Defendant-Appellant's Delayed Appli-

(Footnote Continued on Next Page)

## VI. THE STATE COURTS' FAILURE TO RELY ON ANY PROCEDURAL DEFAULT AND REJECTION OF RESPONDENT'S CONSTITUTIONAL CHALLENGE FOR LACK OF MERIT IN THE GROUNDS PRESENTED RENDERS THE CAUSE AND PREJUDICE REQUIREMENTS OF WAINWRIGHT v SYKES, 433 US 72 (1977), INAPPLICABLE.

Following affirmance of his conviction in his initial appeal to the Michigan Court of Appeals, Respondent wrote a pro se letter request for review to the Michigan Supreme Court pursuant to that Court's letter request review procedure. See generally Administrative Order 1975-9, 395 Mich xliii. The request was granted and current counsel was appointed to prepare a delayed application for leave to appeal for Respondent.4/ The Court's order placed no limits on the issues to be raised. The Court thereafter denied Respondent's delayed application raising the presumed intent instructional issue with no indication whatsoever that its denial was premised on any procedural default. People v Engle, 402 Mich 929 (1978).5/

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(Footnote Continued From Previous Page)

cation for Leave to Appeal, p 4, ¶5d, and Brief in Support, Issue IV, pp 17-21, filed July 6, 1977.

4/ Unpublished Order, April 26, 1976(3a).

5/ Compare e.g. People v Hessell, 414 Mich 947 (1982), where in an order denying leave the Court specifically relied on a procedural default.

Respondent thereafter filed a delayed application for leave to appeal back in the Michigan Court of Appeals raising the instructional issue to shield against any future argument in federal court that he had failed to exhaust his state remedies. That Court denied the application "for lack of merit in the grounds presented."[6/] The Michigan Supreme Court subsequently denied leave to appeal, again without any indication that its denial was premised on a procedural default. People v Engle, 406 Mich 870 (1979).

Petitioner argued in its brief in the Sixth Circuit that the Michigan Courts had concluded on the merits that the instructions challenged by Respondent did not violate Sandstrom.[7/] In its brief in District Court Petitioner similarly argued that the Michigan Courts had reached and considered the question of harmless error.[8/]

Even assuming Michigan does have an initial appeal procedural default rule, the state courts did not apply it in this case [9/]and rejected Respondent's claim for lack of merit in the grounds presented. The cause and prejudice requirments of Wainwright v

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6/ Unpublished Order, August 30, 1978 (4a).

7/ Brief of the Attorney General, pp 10-11.

8/ Brief of the Attorney General in Support of Motion to Dismiss, p 15.

9/ The District Court Magistrate so found in his report and recommendations, p 8 fn 3.

Sykes, 433 US 72 (1977), are therefore inapplicable. County Court of Ulster v Allen, 442 US 140 (1979).

**VII. PETITIONER'S FAILURE BELOW TO RAISE ANY CLAIM DISPUTING THE RETROACTIVE APPLICATION OF SANDSTROM v MONTANA, 442 US 510 (1979), PRECLUDES CONSIDERATION OF THAT CLAIM IN THIS COURT.**

Sandstrom v Montana, 442 US 510 (1979), was decided shortly after the Michigan Supreme Court's denial of Respondent's second application for leave to appeal and was specifically argued by Respondent in support of his habeas pettion in both the District Court and the Court of Appeals. Petitioner never raised any claim in either of those courts that Sandstrom should not be retroactively applied to this case. That claim appears for the first time in Petitioner's petition for a writ of certiorari.

Having deliberately chosen to forego presentation of this claim to the District Court and the Court of Appeals, Petitioner should be precluded from presenting it in this Court. See Steagald v United States, 451 US 204, 208-211 (1981).

**VIII. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR DECIDING THE EXTENT TO WHCH SANDSTROM v MONTANA, 442 US 510 (1979), SHOULD BE RETROACTIVELY APPLIED GIVEN THAT RESPONDENT RAISED HIS CONSTITUTIONAL CHALLENGE TO THE PRESUMED INTENT INSTRUCTIONS IN HIS FIRST APPEAL TO THE MICHIGAN SUPREME COURT IN 1977 TWO YEARS BEFORE SANDSTROM WAS DECIDED.**

This Court's previous decisions under the Due Process Clause of the Fourteenth Amendment enforcing the prosecution's burden of proving each element of the crime charged beyond a reasonable doubt, In re Winship, 397 US 358 (1970), Mullaney v Wilbur, 421 US 684 (1975), have all been given complete retroactive effect because of the fundamental role this burden and standard of proof play in insuring the integrity of the truth determining process. Ivan V. v City of New York, 407 US 203 (1972), Hankerson v North Carolina, 432 US 233 (1977). The decision in Sandstrom v Montana, 442 US 510 (1979), is of the same class and should likewise be accorded complete retroactive effect.

Even if, however, Sandstrom is only to be given limited retroactive effect, Respondent's raising of his constitutional challenge in his initial appeal to the Michigan Supreme Court in 1977, two years before Sandstrom was decided, should qualify him for limited retroactive application. See United States v Johnson, ___ US ___; 102 S Ct 2579; 72 LEd 2d 202 (1982).

Unless Sandstrom is to be accorded no retroactive effect, this case does not present an appropriate vehicle for deciding this federal question.

## CONCLUSION

For these reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

By: _____

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Dated: August 18, 1983

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RECEIVED
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STATE OF MICHIGAN
COURT OF APPEALS

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

v

No. 70103
On Remand

MYRTLE S. GIBSON, a/k/a
MYRTLE LEE SPEARMAN,

Defendant-Appellant.

_____/

BEFORE: R. B. Burns, P.J., and G. S. Allen and D. E. Holbrook, Jr., JJ

PER CURIAM

This case comes to us by an order of the Supreme Court wherein they state:

"On order of the Court, the delayed application for leave to appeal is considered and, in lieu of granting leave to appeal, pursuant to GCR 1963, 853.2(4), we REMAND this case to the Court of Appeals for consideration of the question of whether it was reversible error for the trial court to instruct the jury that 'it is presumed that a person intends the natural consequences of his acts' in light of People v Wright, 408 Mich 1 (1980) and reconsideration of whether reliance on the defendant's confession to support evidence of premeditation and deliberation so as to warrant a bindover on first-degree murder contravenes this Court's decision in People v Allen, 390 Mich 383 (1973).

"We do not retain jurisdiction."

It should be noted that the defendant did not object to the trial judge's instructions, nor did she raise any such issue on appeal. This is understandable as the trial was conducted August 31, 1979, and People v Wright, 408 Mich 1; 289 NW2d 1 (1980) was decided March 4, 1980.

In Wright the Court found that an instruction, "The law presumes that every man or woman intends the natural, the probable, and the legitimate consequence of his or her own willful and voluntary acts" to be unconstitutional.

In our opinion there is no distinction between the two instructions.

We have carefully reviewed the record of the preliminary examination in this case and other than the defendant's confession

there is no evidence to support premeditation and deliberation so as to warrant a bindover on first-degree murder. People v Allen, 390 Mich 383; 212 NW2d 21 (1973).

The case is reversed and remanded for a new trial on second-degree murder.

/s/ Robert B. Burns
/s/ Glenn S. Allen
/s/ Donald E. Holbrook, Jr.

. A SESSION OF THE S[illegible] COURT OF THE STATE OF [illegible]N. Held at the Supreme Court Room, in the City of Lansing, on the 29th day of April in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable

THOMAS GILES KAVANAGH,
Chief Justice.

G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
MARY S. COLEMAN,
JOHN W. FITZGERALD,
LAWRENCE B. LINDEMER,
JAMES L. RYAN,
Associate Justices

CR 16-56

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v 37655

TILDEN N. EIGLE,

Defendant-Appellant.

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Defendant has requested the appointment of counsel under Administrative Order 1975-9, 395 Mich xxvii. The request, the Court of Appeals record, and the trial court record have been considered. On order of the Court, the request is GRANTED. Defendant shall file with the Recorder's Court an affidavit concerning his present financial status (see guidelines at 387 Mich xxxi). The prosecutor shall be furnished a copy of the financial affidavit and may challenge defendant's asserted indigency within 20 days after receiving the affidavit. The challenge, if brought, shall be resolved at a hearing before the Recorder's Court at which the prosecution, defendant and the State Appellate Defender shall appear personally to aid the court's inquiry. The Recorder's Court, upon a finding of indigency, shall appoint the State Appellate Defender and shall furnish any portion of the record counsel may require.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, the 29th day of April in the year of our Lord one thousand nine hundred and seventy-six.

Clerk.

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 25th day of August in the year of our Lord one thousand nine hundred and seventy-eight

Present the Honorable

Donald E. Holbrook
Presiding Judge
Robert B. Burns
Daniel F. Walsh
Judges

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

TELDEN ENGLE,

Defendant-Appellant.

Docket No. 78-1185
L.C. No. 78-09721

In this cause an application for delayed appeal is filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented.

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AUG

STATE OF MICHIGAN --ss.

I, Ronald L. Dzierzek, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in this court in this cause; that I have compared the same with the original and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 31st day of August in the year of our Lord one thousand nine hundred and seventy-eight.

Clerk

Best Copy Available